United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

804

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 23,699

UNITED STATES OF AMERICA,

APPELLEE

V.

CHARLES HILLARD,

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

RICHARD J. HOPKINS
1522 K Street, N.W.
Washington, D. C.
Attorney for Appellant

Cr. No. 494-69

ISSUE PRESENTED

In the opinion of the Appellant, the question presented by this case:

Whether an eyewitness identification by a complainant is sufficient to support a conviction of crime where the complainant saw the assailant's face for only a few seconds, the complainant's description of the assailant did not correspond to the general physical appearence of the Appellant, no other evidecence was presented to show that the Appellant committed the crime, and an independent witness saw the Appellant elsewhere at the approximate time of the robbery.

This case has not previously been before this Court under any other name or title.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 23,699

CHARLES HILLIARD, Appellant

V.

UNITED STATES OF AMERICA, Appellee

Appeal From the United States District Court

For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the Court below, Appellant was charged in a four (4) court indictment charging armed robbery, robbery, assault with dangerous weapon, and carrying a dangerous weapon in violation of Title 22 of the District of Columbia Code Sections 2901, 3202, 502, and 3204 respectively. The count charging robbery was dismissed by the government. The jury returned a verdict of guilty as to the remaining courts of the indictment on July 18, 1969. Appellant was sentenced to serve three (3) years to twenty (20) years on

count (1) one; three (3) years to ten (10) years on count (3) three; one (1) year on count (4) four; said sentences by these counts to run concurrently. Appellant was granted leave to proceed on appeal without prepayment of cost and his appeal was duly noted. This being a final order of the United States District Court, jurisdiction is vested in this Court.

REFERENCE TO RULINGS - None

STATEMENT OF CASE

The Appellant was charged in a four (4) count indictment with armed robbery, robbery, assault with a dangerous weapon, and carrying a dangerous weapon in violation of Title 22, District of Columbia Code, Sections 2901, 3202, 502 and 3204 respectively.

The Appellant was arraigned on April 18, 1969 and entered a plea of not guilty. Trial of the case began on July 17, 1969.

Count two (2) of the indictment charging robbery was dismissed by the government at trial. A verdict of guilty was returned against the Appellant on the remaining counts of the indictment on July 18, 1969. Appellant was sentenced to serve three (3) years to twenty (20) years on count one (1); three years to ten (10) years on count three (3); one (1) year on count four (4); said sentences by these counts to run concurrently. Judgment and committment were filed, and it is from the judgment that the Appellant appeals.

FACTS

Shirley A. Williams, an employee of Contex Realty Co., 2727 - 14th Street, N. W. Washington, D. C. was working alone in the office shortly before 1:00 p.m. on December 30, 1968. (Tr. 6,7,). A man wearing a stocking cap mask on his face, carrying a gun, came in the side door of the office and demanded that Miss Williams produce the cash receipts. (Tr.8) The man took out the $20.00 bill in the cash box and two or three dollars from Miss Williams' purse. (Tr.9) The man went to the side door to depart, (Tr.9) he pulled the stocking cap off his face, stated that he would catch her when she was really loaded, and departed. (Tr. 9, 10) Miss Williams saw the man's face for a few seconds. (Tr.15) Miss Williams was scared and "really shook up" as the man departed because the man told her not to move, and she thought that he was going to shoot. (Tr. 22, 23)

Policemen responded to the scene of the crime five or ten minutes after its occurence. (Tr. 19) Miss Williams described the man to the police as a Negro male, 22 to 23 years of age, six feet tall, thin build, wearing baggy clothes. (Tr. 14, 18, 57, 59)

The Appellant, a man of low education, worked at Louis Billard Parlor, 1901 - 14th Street, N. W., Washington, D. C. (Tr. 79) He drank whiskey heavily. (Tr. 83) On January 5, 1969, the Appellant was having an illness that had the symptons of delirium tremens. (Tr. 65) He awake Mrs. Minnie Lyons, resident manager of the apartment building in which he lived,

at 3:00 a.m. to complain of people making noise in the apartment next to him. (Tr. 65) The apartment next to him, however, was empty. (Tr. 65) Around two hours later at approximately 4:45 a.m., he contacted the resident manager again concerning damage in the apartment and then left the apartment without returning because he heard voices and saw people coming through the walls at him and he became afraid. (Tr. 65, 82) The Appellant went to work at the pool room and started drinking. (Tr. 83) He had no recollection of any other events of the day, but it was later related to him that he was talking to trees and doors. (Tr. 84)

The Appellant ended up on the back porch of Robert E. Lawrence, at 1364 Girard Street, N. W., Washington, D. C. (Tr. 24) 1364 Girard Street, N. W., Washington,D.C. was another entrance to the building at 2727 - 14th Street, N. W., Washington, D. C., the place where the robbery of Miss Williams occurred. (Tr. 24) Robert E. Lawrence was the resident manager of the building. (Tr.33) Robert E. Lawrence, heard a noise on his back porch, obtained a gun, opened the door, and saw the Appellant on the back porch. (Tr. 25) The Appellant told Robert Lawrence that he was Napoleon Solo, the man from U.N.C.L.E. and that he was trailing a man on the back porch. (Tr. 24) Robert E. Lawrence drew his gun on the Appellant and ordered him to wait in the living room, until the police arrived. (Tr. 25, 26) The police arrived and arrested the Appellant. (Tr. 26)

Detective Robert Bradley recieved a call from Leslie Bruce, the manager of Contex Realty Co., informing him that Robert E. Lawrence had found a man on his back porch who might have

robbed Miss Williams on December 30, 1968. Detective Bradley obtained a picture of the Appellant, mixed it with nine other photographs, and asked Miss Williams to examine the photographs and see if she recognized the man that robbed her. (Tr. 20,33) Miss Williams picked out the photograph of the Appellant and stated that he looked like the man that robbed her. (Tr.20) Detective Bradley then informed her that the Appellant was the man that Mr. Lawrence found on the back porch of the apartment building (Tr. 20)

The Appellant was placed in a line up on February 13, 1969 for Miss Williams to view. (Tr. 40) Miss Williams was asked if she saw anyone in the line up who robbed her, and she stated: "number one" man, but he looks shorter than the man. (Tr. 42,43)

The sole evidence presented to show that Appellant committed the robbery of Miss Williams on December 30, 1968 was the Appellant's identification by Miss Williams. (Tr. 13, 30, 42) Miss Williams admitted that the appellant did not fit the description of the robber that she had given to the police and that she had seen the robber's face for only a few seconds (Tr. 14, 15, 17, 21,) The only thing unusual that she recalled about the robber's face was his eyes, and that he had rough, bumpy skin similar to the Appellant. (Tr. 12) Miss Williams admitted that approximately ten minutes after the robbery, she described the robber to the police as being six feet tall, slender, and in his twenties. (Tr. 14) On viewing the Appellant in court, Miss Williams stated that the Appellant was not slender, was less than six feet tall, and appeared to be around 28 years old. (Tr. 21, 22) The Appellant was 5' 9" tall, weighed 182 lbs, and was 33 years old. (Tr. 85, 86)

The Appellant denied involvement in the robbery of Contex Realty Co. and presented evidence to show that he had been ill on December 30, 1968 and had stayed home all day. (Tr. 80) The only time Appellant left his apartment on that day was around noon to pay his weekly rent. (Tr. 80) The Appellant's testimony that he paid his rent sometime between 12:00 a.m. and 1:00 p.m. was corroborated by Minnie Lyons, the resident manager of the apartment building. (Tr. 61, 62) Mrs. Lyons gave the Appellant a receipt from a book kept in the regular course of business to record rent collections. (Tr. 61, 63, 64) The receipts were in triplicate, one copy for the tenant, one copy for the apartment owner, and the other copy for the rent receipt book. (Tr. 62) The carbon copy of the receipt given to the Appellant that remained in the rent book indicated that the receipt was given to the Appellant on December 30, 1968. (Tr. 62)

The Appellant's testimony that he had been ill on December 30, 1968 and had stayed home all day was corroborated also by Bernice Harris, a friend of his, who visited him that day (Tr. 47, 48)

STATEMENT OF POINTS

1. The evidence presented at the Appellant's trial was insufficient to show guilt because the sole evidence presented against him was the contradictory identification of the complainant, who had only limited opportunity to observe her assailant. The Appellant's defense of alibi, which was corroborated by an independent witness, could not be disregarded where the only evidence contradicting it rest upon a contradictory identification of the complainant.

SUMMARY OF ARGUMENT

POINT I

Generally, in the absence of a statue, a conviction may rest upon the uncorraborated testimony of a prosecuting witness, if such testimony is otherwise credible, and questions concerning identification and the whereabouts of the accused at the time of the crime are questions of fact which must be submitted to the trier of fact. However, a conviction should be reversed where the identification of the Defendant is contradictory, doubtful, vague, uncertain, and unsupported by any other evidence to corraborate the Defendant's presense at the scene of the crime. A defense of alibi, that is corraborated by an independent source can not be disregarded where the sole and only evidence contradicting it rest upon a contradictory, doubtful, vague or uncertain identification of the prosecuting witness, who had only limited opportunity to observe her

assailant, and no other evidence was presented to corroborate the Defendant's presence at the scene of the crime.

Recent decisions of the United States Supreme Court and this Court have recognized that no class of testimony is more uncertain and less to be relied upon than eyewitness identifications of strangers. The annals of criminal law is rife with instances of mistaken identity. As a result of the recognized unreliability of eyewitness identification, the recent trend in the law is to impose higher standards on the use of eyewitness identifications. This court should impose higher standards for convictions of crime based solely upon uncorraborated eyewitness identifications, especially in instances where the identifications are contradictory and contradicted by evidence of alibi that is corraborated by an independent source. Such standards have already been adopted by some state courts.

The Appellant's conviction should be reversed because evidence presented at his trial does not produce an abiding conviction of his guilt. Adherence to the common law rule requiring the Court to be bound by the jury finding of fact concerning the Appellant's identity as the perpetrator of the offense charged would result in manifest injustice in this case because the evidence on which the finding of fact was based was too tenous to show his guilt.

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The Appellant's conviction should be reversed because evidence prsented at his trial does not produce an abiding conviction of his guilt. Adherence to the comman law rule requiring the Court to be bound by the jury finding of fact concerning the Appellant's identity as the perpetrator of the offense charged would result in manifest injustice in this case because the evidence on which the finding of fact was based was too tenous to show his guilt.

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT THE APPELLANT'S TRIAL WAS INSUFFICIENT TO SHOW HIS GUILT.

Mistaken identity has been a major factor contributing to miscarriages of justice. The United States Supreme Court observed in United States v. Wade, 388 U.S. 218 (1967) at 388 U.S. 263:

> The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identifications. Mr. Justice Frankfurter once said, 'what is the worth of eyewitness identification even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent - not due to brutalities of ancient criminal procedure." The case of Sacco and Vanzette 39 (1927).

The Pennsylvania Superior Court observed on several occasions that no class of testimony was more uncertain and less to be relied upon than eyewitness identification. Commonwealth v. Sharpe, 138 Pa. Super. 156, 10 A. 2d 120 (1939); Commonwealth v. Bird, 152, Pa. Super. 648, 33 A. 2d 531 (1943) See also Borchard, Convicting the Innocent; Frank & Frank, Not Guilty; Wall, Eyewitness Identification in Criminal Cases; and the numerous collection of authorities cited by the United States Supreme Court in United States v. Wade, 388 U.S. 218, 228 (1967) at footnotes 6 and 7.

Generally in the absence of a statue, such as 22 D.C. Code § 501 (1967) requiring corraboration of sex offenses, a conviction of crime may rest upon the uncorraborated testimony

witness, if such testimony is otherwise credible. Questions concerning identity or the whereabouts of the accused at the time of the offense are questions of fact to be submitted to the jury. Ordinarily, jury decisions on the identity of the accused as the perpetrator of the offense, or his presence at the scene of the offense are binding upon the court. However, a conviction should be reversed where the evidence on which the jury based its verdict was too tenous to show guilt. An uncorraborated eyewitness identification of the accused by the prosecuting witness has been held to be insufficient to show guilt where the testimony of the prosecuting witness established only that the accused bore a general resemblence to the perpetrator of the offense or the prosecuting witness descriptions of the perpetrator do not resemble the accused or bear a material varence from the general characteristics of the accused.

It is submitted that the evidence presented at the Appellant's trial was insufficient to show that he committed the crime charged. The Appellant's conviction rests upon the identifications of Miss Williams, the victim, and the fact that he was found two weeks later in the apartment building where the robbery occurred exhibiting the characteristics of a person suffering from delirium tremens. Miss Williams described her assailant as six feet tall, slender build, wearing baggy clothes and a stocking cap mask over his face. She saw her assailant's face for a few seconds. She observed her assailant's general physicaly characteristics during the entire course of the robbery. The record shows that the Appellant is five feet nine inches tall, 182 pounds in weight and thirty three years old.

No evidence was presented to show that the Appellant had clothes similar to those that Mrs. Williams testified that her assailant wore. Nor was it shown that the Appellant had a pistol similar to Miss Williams' assailant or that he had a pistol. The Appellant's testimony that he was home ill on the date of the robbery was corroborated by other witnesses. On the other hand the record contains no evidence to corraborate the Appellant's presence at the scene of the crime other than Miss Williams' testimony.

Although Miss Williams purported to identify positively the Appellant as her assailant, her testimony was in effect no identification. She was saying in effect that her assailant was a six feet tall, slender young man, who was the five foot nine inches, 35 years old Appellant. Eyewitness identifications similar to Miss Williams' have been held to be insufficient to show guilt if otherwise uncorraborated. In People v. Barney, 60 Ill. App. 2d 79, 208 N. E. 2d 379 (1965) the complainant, a narcotics agent, described the person to whom he sold narcotics as a Negro male, 26 years old, five feet, six inches tall, 170 lbs, who walked with a stoop. He stated that he was positive that the man to whom he sold narcotics was the defendant. The defendant in the case was a Negro male, 35 years old, five feet, eleven inches tall, 210 to 220 pounds in weight with erect posture. The Court held that in the absence of any other corraborating evidence the identification was insufficient to show guilt. The Supreme Court of Illinois reversed a conviction for rape in People v. Gardner, 35 Ill. 2d 564, 221 N.E. 2d 232 (1966) where the complainant told police her assailant was a Negro male between 29 and 30 years of age, six feet, one

[illegible] tall, 1[illegible] pounds in weight, with light complexion, black short hair, wearing a blue shirt and blue fatigue pants. The police arrested a man a few blocks from the victims house who was six feet, two inches tall, 265 pounds in weight, wearing dark blue pants, a white shirt, army boots and a black and white sweater. Medical tests of the suspect's shorts and body revealed no evidence of recent sexual intercourse. An independent witness saw the suspect elsewhere at the time of the commission of the offense.

The Maryland Court of Special Appeals reversed a robbery conviction in Lothes v. Maryland, Sept. Term, 1969, No. 140 where a witness described a suspect as small with a round face, dark eyes and a white or mulatto complexion. The defendant was five feet, seven or eight inches in height, with a narrow face, light hazel or green eyes, and a very white complexion.

The rule is well established in one jurisdiction, Illinois, that is the absence of other corraboration evidence, an eyewitness identification of a defendant is insufficient if the witnesses description of the perpetrator of the offense do not resemble the physical characteristics of the defendant. People v. Harrison, 25 Ill. 2d 407, 185 N.E. 2d 244 (1962); People v. Brown 73 Ill. App. 2d 448, 220 N.E. 2d 93 (1960); People v. Marshall, 74 Ill. App. 2d 483, 221 N.E. 2d 133 (1966); People v. Morton, 95 Ill. App. 2d 457, 238 N.E. 2d 205 (1968). In People v. Brown, supra, the court reversed a conviction where the victim identified the defendant at trial as the perpetrator, and described the perpetrator as having different height, weight, color of hair, and complexion than the defendant. In People v. Marshall, 74 Ill. App. 2d 483, 221 N.E. 2d 133 (1966), a robbery

conviction was reversed where the victim described the robber as a colored man, with a black mustach, 20 years old, between five foot, ten or eleven inches tall and identified the defendant, who was five foot, six inches tall, with no mustach, as the perpetrator. In People v. Morton, 95 Ill. App. 2d 457, 238 N.E. 2d 295 (1968) a conviction for robbery was reversed where the victim described the robber as five feet, seven or eight inches tall and clean shaven and identified the defendant, who was six feet four inches tall with a mustach, as the perpetrator.

The Courts of Pennsylvania follows a rule similar to Illinois concerning eyewitness identification that purport to be positive but engraft different physical characteristics upon the person identified. In Commonwealth v. Bird, 152 Pa. Super. 648, 33 A. 2d 531 (1943) a larceny conviction was reversed where the victim identified the defendant as the thief but identified the woman who accused him as taller than the defendant, with a mole that the defendant did not have. See also, Commonwealth v. Sharpe, 138 Pa. Super, 156, 10 A. 2d 120 (1939).

Although not deciding the point, this Court indicated its dissatisfaction with the sufficiency of eyewitness identification where the victim identifies the accused as the perpetrator but testifies that the perpetrator had different physical characteristics from the accused. McKenzie v. United States, 126 F. 2d 533 (D.C. Cir. 1942). In the later case the victim described her assailant as a man between thirty and thirty five years of age and the record indicated that witnesses spoke of the defendant as a boy. The victim also described her assailant as having certain different physical characteristics from the defendant.

Cases involving the sufficiency of evidence where the eyewitness states that the accused looks like the perpetrator but he is not sure present no problem, if there is no other evidence to corraborate the accused's presence at the scene of the crime. Likewise, courts have no hesitancy in declaring insufficient eyewitness identification where the witness testifies that the acused looks like the perpetrator. Peterson v. District of Columbia, 171 A. 2d 95 (D.C. App 1961); Alexander v. United States, 354 F. 2d 59 (5th Cir. 1965); Hendrix v. United States, 327 F. 2d 971 (5th Cir. 1964): Ross v. State,190 So. 2d 197 (Fla. 1966); Commonwealth v. Sharpe, 138 Pa. Super. 156, 10A 2d 120 (1939) An eyewitness identification in which the witness states that he identifies positively the accused as the perpetrator but describes the perpetrator as having different physical characteristic from the accused should be given no more weight than an identification in which the witness states that the accused resembles the perpetrator but that the accused has different physical characteristics from the perpetrator. Both identification convey the same meaning. The witnesses choice of language should not be the controlling factor. (Compare teh identification given in this case with that in Commonwealth v. Bird, supra and Commonwealth v. Sharpe, supra.)

The United States Supreme Court observed in United States v. Wade, 388 U.S. 218 (1967) at 299: "...it is a matter of common experience that once a witness has picked out the accused at the line up, he is not likely to go back on his word later on..." The Supreme Court of Florida ruled that the above principle was one of the factors that made the identification in Ross v. State, supra, insufficient. The Court in Ross v. State, also considered the limited opportunity of the witness

to observe his assailant as another factor contributing to the insufficiency of the identification. The sufficiency of Appellant's identification should also be considered in terms of these principles, not merely in terms of factors affecting the weight that might be given to the identification by the trier of fact, but in terms of the legal sufficiency.

CONCLUSION

In conclusion, this Court, in view of the foregoing, reverse the judgment below and cause judgment to be entered therein for the Appellant.

Respectfully Submitted

Richard J. Hopkins

Richard J. Hopkins
1522 K Street, N. W.
Washington, D. C. 20005
296-5348
Attorney For Appellant
(appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was personally served upon the Office of the United States Attorney for the District of Columbia, 3rd & Constitution Avenue, N.W., Washington, D. C. this 20th day of February, 1970.

Richard J. Hopkins

Richard J. Hopkins